



May 10, 1999

Mr. John M. Hill
Cowles & Thompson, P.C.
901 Main Street, Suite 4000
Dallas, Texas 75202-3973

OR99-1261

Dear Mr. Hill:

You have asked whether certain information is subject to required public disclosure under the Texas Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 123912.

The City of the Colony (the "city"), which your office represents, received a request for "any and all documents relating to any settlement agreements entered into between The Colony and Burlington Northern and Santa Fe Railway concerning the settlement of any eminent domain, state court and/or federal court proceeding relating to the City crossing BNSF's railroad tracks." In response to the request, you submit to this office for review the information which you assert is responsive. You contend that the submitted records are excepted from required public disclosure by sections 552.101, 552.103, and 552.110 of the Government Code. We have considered the exceptions and arguments you raise, and have reviewed the information submitted.

Initially, we consider a "recital" clause within the settlement agreement that purports to make the requested information confidential. Generally, governmental bodies are prohibited from entering into contracts to keep information confidential. Open Records Decision Nos. 514 (1988), 484 (1987), 479 (1987). The Public Information Act requires the release of all information held by governmental bodies unless one of the act's specific exceptions protects the information from required disclosure. *Id.* Unless a governmental body is explicitly authorized to make an enforceable promise to keep information confidential, it may not make such a promise in a settlement agreement. Open Records Decision No. 114 at 1 (1975). However, if a court issues an order making the terms of a

settlement agreement confidential, the agreement is confidential under section 552.107(2) of the Government Code. Since there is no evidence that the city has the requisite statutory authority or that it obtained a court order, the city may not withhold the settlement agreement based upon the confidentiality provision set out in the agreement.¹

We next address your assertion that section 552.101 excepts the requested information from required public disclosure. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 154.073 of the Texas Civil Practice and Remedies Code provides that:

(a) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

In this instance, it is not clear, nor have you established, that the requested settlement agreement was made pursuant to an alternative dispute resolution proceeding in accordance with the Texas Alternative Dispute Resolution Procedures Act. Furthermore, it appears that the submitted “Compromise Settlement Agreement and Release” constitutes a final settlement agreement. Section 552.101 in conjunction with section 154.073 of the Civil Practice and Remedies Code does not except from required public disclosure a governmental body’s mediated final settlement agreement. *See* Open Records Decision No. 658 (1998) (section 552.101, in conjunction with section 154.073, does not except governmental body’s mediated final settlement agreement from disclosure, but other exceptions to disclosure may apply to settlement agreement). Therefore, we conclude that the agreement is not confidential under section 552.101 of the Government Code in conjunction with section 154.073 of the Texas Civil Practice and Remedies Code.

You next argue that the requested settlement agreement is confidential under section 552.103. Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party; and

¹We further note that information is not confidential under the Public Information Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

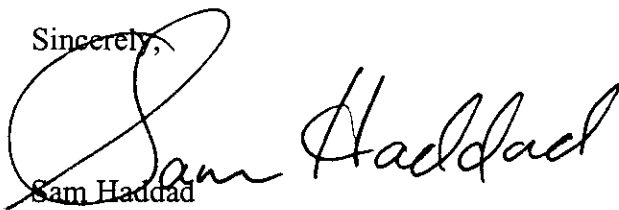
(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 at 1 (1991). Based on your submissions, however, it appears that the case is settled. The applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575(1982); Open Records Decision No. 350 (1982). Further, the final terms of a settlement agreement are not excepted by section 552.103(a). *See* Open Records Decision Nos. 245 (1980), 139 (1976), 114 (1975). Consequently, the city may not withhold the settlement agreement under section 552.103.

Finally, we address your argument in support of the applicability of section 552.110 to the requested information. Pursuant to section 552.305, we notified Burlington Northern and Santa Fe Railway Company ("BNSF") and Mr. Henry Billingsley, ("the Developer"), whose proprietary interests may be implicated by this request for information, and provided them with an opportunity to claim that the information at issue is excepted from disclosure. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990). The notification states that if the company does not respond within 14 days of receipt, this office will assume that the company has no privacy or property interest in the requested information. Since neither BNSF nor the Developer responded to our notification, we assume that the respective companies have no property or privacy interest in the information. Therefore, we have no basis to conclude the information about BNSF or the Developer is excepted from required public disclosure. Consequently, since the requested information cannot be withheld under any of the claimed exceptions it must be released to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Sam Haddad", is written over a printed name "Sam Haddad". The signature is fluid and cursive.

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 123912

encl: Submitted information

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